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CONCLUSION

The presumption against viewpoint discrimination, relied upon in Hudnut and further strengthened in R.A.V., has come to serve as the very keystone of First Amendment jurisprudence. This presumption, in my view, has real worth, in protecting against improperly motivated governmental action and against distorting effects on public discourse. And even if I assign it too great a value, the principle still will have to be taken into account by those who [*902] favor any regulation either of hate speech or of pornography. I have suggested in this Essay that the regulatory efforts that will achieve the most, given settled law, will be the efforts that may appear, at first glance, to promise the least. They will be directed at conduct, rather than speech. They will be efforts using viewpoint-neutral classifications. They will be efforts taking advantage of the long-established unprotected category of obscenity. Such efforts will not eradicate all pornography or all hate speech from our society, but they can achieve much worth achieving. They, and other new solutions, ought to be debated and tested in a continuing and multi-faceted effort to enhance the rights of minorities and women, while also respecting core principles of the First Amendment.

women and minorities, who have the most to lose from the establishment of political orthodoxy, [*883] would gain by jettisoning the First Amendment doctrine that most protects against this prospect.

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n30 Stevens, 102 Yale L J at 1304 (cited in note 19).

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None of this discussion, of course, denies either the possibility or the desirability of crafting carefully circumscribed exceptions to First Amendment norms of viewpoint neutrality, and in the last section of this Essay, I briefly consider whether and how this task might be accomplished. Perhaps more important, none of this discussion gainsays the possibility of responding to the harms of pornography and hate speech through measures that do not contravene these norms. It is surely these measures, viewed from a pragmatic perspective, that stand the best chance of succeeding. And it usually will be these measures that pose the least danger to free speech principles. I turn, then, to a consideration of such proposals, less with the aim of making specific recommendations than with the aim of injecting new questions into the debate on hate speech and pornography regulation.

II. NEW APPROACHES

I canvass here four general approaches; each is capable of encompassing many specific proposals. The four approaches are, in order: (1) the enactment of new, or the stricter use of existing, bans on conduct; (2) the enactment of certain kinds of viewpointneutral speech restrictions; (3) the enhanced use of the constitutionally unprotected category of obscenity; and (4) the creation of carefully supported and limited exceptions to the general rule against viewpoint discrimination. The proposals I outline within these approaches are meant to be illustrative, rather than exhaustive. Many fall well within constitutional boundaries; others test (or, with respect to the fourth approach, directly challenge) the current parameters. The latter proposals raise hard questions relating to whether they (no less than the standard viewpoint-based regulation) too greatly subvert principles necessary to a system of free expression. I will touch on many of these questions, although I cannot give them the extended treatment they merit.

A. Conduct

The most obvious way to avoid First Amendment requirements is to regulate not speech, but conduct. Recently, some schol [*884] ars have sought to meld these two together. n31 Speech is conduct, they say, because speech has consequences (speech, that is, "does" something); or conduct is speech because conduct has roots in ideas (conduct, that is, "says" something). I use these terms in a different sense. When "conduct" becomes a synonym for "speech" (or "speech" for "conduct"), the command of the First Amendment becomes incoherent; depending on whether the paradigm of conduct or speech holds sway, government can regulate either almost everything or almost nothing. The speech/conduct line is hard to draw, but it retains much meaning in theory, and even more in practice. When I say "conduct," then, I mean acts that, in purpose and function, are not primarily expressive. n32 The government can regulate such acts without running afoul of the First Amendment. n33 Here, I discuss two specific kinds

of conduct regulation: the continued enactment and use of hate crimes laws and the increased application of legal sanctions for acts commonly performed in the making of pornography.

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n31 See MacKinnon, Feminism Unmodified at 129-30, 193-94 (cited in note 13); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L J 431, 438-44.

n32 The approach, in focusing on expressive quality, is similar to the analysis that Cass Sunstein presents in these pages. See Words, Conduct, Caste, 60 U Chi L Rev at 807-09 (cited in note 17). See also Amar, 106 Harv L Rev at 133-39 (cited in note 27). Of course, as sketched here, the definition begs all kinds of questions about when acts, either in purpose or in function, are primarily expressive.

n33 So, for example, it goes without saying that the City of St. Paul could have proceeded against the juvenile offenders in R.A.V. through the law of trespass. See R.A.V., 112 S Ct at 2541 n 1 (listing other statutes under which the offenders could have been punished).

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The typical hate crimes law, as the Supreme Court unanimously ruled last Term, presents no First Amendment problem. n34 Hate crimes laws, as usually written, provide for the enhancement of criminal penalties when a specified crime (say, assault) is committed because of the target's race, religion, or other listed status. n35 These laws are best understood as targeting not speech, but acts--because they apply regardless whether the discriminatory conduct at issue expresses, or is meant to express, any sort of message. In this way, hate crimes laws function precisely as do other discrimination laws--for example, in the sphere of employment. n36 [*885] When an employer fires an employee because she is black, the government may impose sanctions without constitutional qualm. This is so even when the discharge is accomplished (as almost all discharges are) through some form of expression, for whatever expression is involved is incidental both to the act accomplished and to the government's decision to prevent it. n37 The analysis ought not change when a person assaults another because she is black, once again even if the conduct (assault on the basis of race) is accompanied by expression. A penalty enhancement constitutionally may follow because it is pegged to an act--a racially-based form of disadvantage--that the state wishes to prevent, and has an interest in preventing, irrespective of any expressive component. In other words, in the assault case, no less than in the discharge case, the government decides to treat race-based acts differently from similar non race-based acts; and in the assault case, no less than in the discharge case, this decision--a decision to prevent disproportionate harms from falling on members of a racial group--bears no relation to whether the race-based act communicates a message. Thus might end the constitutional analysis.

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n34 Wisconsin v Mitchell, 113 S Ct 2194 (1993).

n35 See, for example, Cal Penal Code 422.7 (West 1988 & Supp 1993); NY Penal Law 240.30(3) (McKinney Supp 1993); Or Rev Stat 166.165(1)(a)(A) (1991); Wis Stat Ann 939.645 (West Supp 1992).

n36 The Supreme Court in Mitchell noted the precise analogy between Title VII and the hate crimes statute at issue in the case. See 113 S Ct at 2200. It is noteworthy that both laws apply not only irrespective of whether the discrimination at issue expresses a message, but also irrespective of whether the discrimination is caused by particular beliefs. If, for example, discrimination laws prohibited discharges or assaults motivated by racial hatred--rather than simply based on race--they would pose a very different, and seemingly severe, First Amendment problem.

n37 Cass Sunstein makes this point in Words, Conduct, Caste, 60 U Chi L Rev at 827-28; his phrasing is that in such a case, the communication is merely evidence of, or a means of committing, an independently unlawful act. Professor Sunstein, however, appears to think that this analysis fails to cover hate crimes, because there the state's interest arises from the expressive nature of the conduct. As stated in the text, I do not believe this to be the case. A state has a legitimate interest in preventing, say, assaults on the basis of race, even when they are wholly devoid of expression. The interest is the same as the one in preventing discharges on the basis of race; it is an interest in eradicating racially-based forms of disadvantage generally, whether or not accompanied by communication of a message.

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Perhaps, however, this argument is not quite so easy as I have made it out to be. It might be said, in response, that racially-based assaults, more often than racially-based discharges, are committed in order to make a statement. If this is true, a penalty enhancement not only will restrict more speech incidentally, but also may raise a concern that the government is acting for this very purpose. Or perhaps it might be said, more generally, that the use of a discriminatory motive to define an act, even supposing the act has no expressive component, at times may be highly relevant to First Amendment analysis: consider, for example, a penalty enhancement provision applicable to persons who obstruct voting on the basis of a voter's affiliation with the Republican Party. [*886]

But both of these objections seem to falter on further consideration of the nature of hate crimes regulation and the governmental interest in it. The voting obstruction law I have hypothesized (no less than a hate crimes law) applies to conduct regardless of whether it has expressive content, but the government's interest in the law always in a certain sense relates to expression: it is difficult to state, let alone give credence to, any interest the government could have, other than favoring or disfavoring points of view, for specially penalizing voting obstruction based on affiliation with a particular political party. n38 In the case of hate crimes laws, by contrast, the government not only is regulating acts irrespective of their expressive component, but also has a basis for doing so that is unrelated to suppressing (or preferring) particular views or expression--the interest, once again, in preventing conceded harms from falling inequitably on members of a particular racial group. In such a case, the regulation should be found to accord with First Amendment requirements, notwithstanding that it incidentally affects some expression. As the Court in R.A.V. noted, in referring to employment discrimination laws, "Where the

government does not target conduct on the basis of its expressive content,"--and where, we might add, the government, in regulating conduct, has a credible interest that is unrelated to favoring or disfavoring certain ideas or expression--"acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." n39

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n38 The hypothetical voting law might seem very different if enhanced penalties applied to obstruction based on the voter's affiliation with any political party, rather than with the Republican Party alone. In enacting this broader law, the state could have determined that it had an interest in protecting persons from suffering disproportionate harm as a result of their political views, analogous to the interest in protecting persons from suffering disproportionate harm as a result of their race. Under the analysis suggested in the text, this new voting law would meet constitutional standards because it applies regardless whether the conduct communicates a message and because the government now has a credible interest in the law not related to favoring or disfavoring particular viewpoints and messages.

n39 112 S Ct at 2546-47.

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In accord with this reasoning, communities should be able not only to impose enhanced criminal sanctions on the perpetrators of hate crimes, but also to provide special tort-based or other civil remedies for their victims. One of the accomplishments of the antipornography movement has been to highlight the benefits of using the civil, as well as the criminal, laws to deter and punish undesirable activity. n40 Civil actions involve fewer procedural safeguards for the defendant, including a much reduced standard of proof; as [*887] important, they may give greater control to the victim of the unlawful conduct than a criminal prosecution ever can do. Communities therefore should consider not merely the enactment of hate crimes laws, but also the provision of some kind of "hate torts" remedies. And in determining the scope of all such laws, communities should consider the manner in which the laws apply to crimes or civil violations committed on the basis of sex, which now often fall outside the compass of hate crimes statutes.

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n40 See Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv CR- CL L Rev 1, 29 n 52 (1985).

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To address the harms arising from pornography, the government has numerous available mechanisms that regulate not speech, but conduct. At an absolute minimum, states can prosecute actively, under generally applicable criminal laws, the sexual assaults and other violent acts so frequently committed against women in the making of pornography. Similarly, as Judge Easterbrook suggested in Hudnut, states may specifically make illegal (if they have not already) the use of fraud, trickery, or force to induce people to perform in any films, without regard to viewpoint. n41 Extensive regulation of such practices is the lot of many industries; the visual media surely are not entitled to any special

exemption. With respect to regulatory effects of this kind too, responses based on the criminal law can be supplemented by enhanced tort remedies. n42

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n41 771 F2d at 332.

n42 For a discussion of whether the government, in addition to banning the conduct itself, may prohibit the dissemination of speech produced by means of this unlawful conduct, see text accompanying notes 55-61.

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A much more questionable means of deterring the production of pornographic works would be to press into service laws regulating prostitution, pimping, or pandering. In one recent case, an Arizona court upheld, against First Amendment challenge, the use of prostitution and pandering statutes against a woman who managed and performed in a sex show. n43 The court reasoned, consistent with established First Amendment doctrine, that the prosecutions were permissible because even if the show had expressive content, the state had acted under statutes directed at conduct in order to fur [*888] ther interests unrelated to the suppression of expression. n44 The same argument could be made whenever the government acts against a pornographer under a sufficiently broad pimping or pandering statute, so long as the prosecution were based on a significant interest unrelated to speech, such as the prevention of sexual exploitation. The problem with this analysis lies in its potential scope: many films that no one would deem pornographic contain sexual conduct by hired actors and thus fall within the very same statutes. Notwithstanding all I have said above, even the neutral application of a law that is not itself about speech might in some circumstances violate the First Amendment. (Consider, to use an extreme example, an environmental law imposing a ban on cutting down trees, as applied to producers of books and newspapers.) In all probability, the use of pimping and pandering statutes in the way I have just considered suffers from this constitutional defect, given the potential for applying such statutes to large amounts of speech at the core of constitutional protection.

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n43 Arizona v Taylor, 167 Ariz 429, 808 P2d 314, 315-16 (1990). The state's prostitution statute prohibited "engaging in or agreeing or offering to engage in sexual conduct with another person under a fee arrangement with that person or any other person." Id. The use of statutes of this kind against women who merely perform in pornography raises a special concern: such prosecutions make a criminal of the very victim of exploitative practices. Moreover, these prosecutions may have little value: they are likely to deter the production of pornography far less well than prosecuting the actual pornographer under pimping, pandering, or other similar statutes, which essentially prohibit the hiring of persons to engage in sexual practices.

n44 Id at 317. The key case supporting this analysis is United States v O'Brien, 391 US 367 (1968), in which the Court approved the use of a statute prohibiting any knowing destruction of a Registration Certificate, purportedly enacted to further the efficient operation of the draft, against a person who had burned his draft card as part of a political protest.

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Those favoring the direct regulation of pornography often charge that relying exclusively on bans on conduct--most notably, a ban on coerced performances--would allow abuses currently committed in the manufacture of pornography to continue. n45 Such approaches, even if determinedly enforced, certainly will have less effect than banning pornography altogether. But once again, the most sweeping strategies also will be the ones most subject to constitutional challenge and the ones most subversive of free speech principles. An increased emphasis on conduct, rather than speech, provides a realistic, principled, and perhaps surprisingly effective alternative.

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n45 See, for example, Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum L Rev 1, 23-24 (1992).

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B. Viewpoint-Neutral Restrictions

The Supreme Court often has said that any speech restriction based on content, even if not based on viewpoint, presumptively violates the First Amendment. n46 But rhetoric in this instance is [*889] semi-detached from reality. The Court, for example, sometimes has upheld regulations based on the subject matter of speech. n47 And the Court in several cases has approved restrictions on non-obscene but sexually explicit or scatological speech. n48 Cases of this kind raise the possibility of eradicating the worst of hate speech and pornography through statutes that, although based on content, on their face (and, to the extent possible, as applied) have no viewpoint bias.

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n46 See, for example, Police Department of Chicago v Mosley, 408 US 92, 95-96 (1972); Simon & Schuster, Inc. v Members of the New York State Crime Victims Board, 112 S Ct 501, 508-09 (1991); Consolidated Edison Co. of New York v Public Service Commission of New York, 447 US 530, 536 (1980).

n47 See, for example, Burson v Freeman, 112 S Ct 1846 (1992); Greer v Spock, 424 US 828 (1976); CBS v Democratic National Committee, 412 US 94 (1973). See generally Geoffrey R. Stone, Restrictions of Speech Because of its Content: The Peculiar Case of SubjectMatter Restrictions, 46 U Chi L Rev 81 (1978). R.A.V. might be thought to treat subject matter restrictions with the same distrust shown to viewpoint restrictions: the technical holding of the Court was that the St. Paul ordinance facially violated the Constitution "in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." 112 S Ct at 2542. But elsewhere in the opinion, the Court made clear that its true concern related to viewpoint bias. What most bothered the Court was that the subject matter restriction operated in practice to restrict speech of only particular (racist, sexist, etc.) views. See, for example, id at 2547-49.

n48 See FCC v Pacifica Foundation, 438 US 726 (1978) (indecent radio broadcast); Young v American Mini-Theatres, 427 US 50 (1976) ("adult"

theaters); City of Renton v Playtime Theatres, Inc., 475 US 41 (1986) (same).

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One potential course is to enact legislation, or use existing legislation, prohibiting carefully defined kinds of harassment, threats, or intimidation, including but not limited to those based on race and sex. For example, in considering the St. Paul ordinance, the Court in R.A.V. noted that the city could have achieved "precisely the same beneficial effect" through " a n ordinance not limited to the favored topics" n49 --that is, through an ordinance prohibiting all fighting words, regardless whether based on race, sex, or other specified category. An ordinance of this kind would have presented no constitutional issue at all given the Court's prior holdings that fighting words are a form of unprotected expression. n50 A law prohibiting, in viewpoint-neutral terms, not merely fighting words but other kinds of harassment and intimidation would (and should) face greater constitutional difficulties, relating most notably to overbreadth and vagueness; but a carefully drafted statute might well surmount these hurdles, and such a law surely would not be subject to the selectivity analysis of R.A.V. Viewpoint-neutral laws of this kind--whether framed in terms of fighting words or in some other manner--might be especially appropriate in com [*890] munities (such as, perhaps, educational institutions) whose very purposes require the maintenance of a modicum of decency. n51

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n49 112 S Ct at 2550.

n50 See Chaplinsky v New Hampshire, 315 US 568, 572 (1942). Of course, the application of the ordinance to any particular expression might well raise serious constitutional issues relating to the permissible scope of the fighting words category.

n51 See Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 Wm & Mary L Rev 267, 317-25 (1991), for a general discussion of the compatibility of speech regulation with the objectives of higher education.

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Another approach, relevant particularly to pornography, could focus on regulating materials defined in terms of sexual violence. At first glance, R.A.V. and (especially) Hudnut seem to doom such efforts, but this initial appearance may be deceptive. The problem in Hudnut involved the way the ordinance under review distinguished between materials presenting women as sexual equals and materials presenting women as sexual subordinates: two works, both equally graphic, would receive different treatment because of different viewpoints. n52 This problem, the court suggested, would not arise if a statute instead were to classify materials according to their sexual explicitness. n53 Indeed, the Supreme Court already has said as much by treating as non-viewpoint-based (and sometimes upholding) regulations directed at even non-obscene sexually graphic materials. n54 If a regulation applying to sexually explicit materials does not raise concerns of viewpoint bias, perhaps neither does a regulation applying to works that are both sexually explicit and sexually violent.

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n52 See 771 F2d at 328.

n53 Id at 332-33.

n54 See note 48 and accompanying text. The Court has failed to indicate precisely when regulations of this kind, even assuming they are not viewpoint-based, will meet constitutional standards. All of the regulations upheld by the Court have involved not complete bans, but more limited restrictions. A law foreclosing such speech entirely would raise constitutional concerns of greater dimension.

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One counterargument might run that the reference to sexual violence in this hypothetical statute would function simply as a code word for a disfavored viewpoint: sexually violent materials present women as subordinates; sexually non-violent materials present women as equals; hence, the law replicates in covert language the faults of the MacKinnon-Dworkin ordinance. But this response strikes me as flawed, because many non-violent works present women as sexual subordinates, and some violent materials may not (violence is not necessarily a synonym for non-equality). The question is by no means free from doubt--much depends on how far the Court will or should go to find viewpoint discrimination in a facially neutral statute--but framing a statute along these lines seems worth consideration. [*891]

Finally, and once again of particular relevance to pornography, the Constitution may well permit direct regulation of speech, if phrased in a viewpoint-neutral manner, when the regulation responds to a non-speech related interest in controlling conduct involved in the materials' manufacture. Assume here, as discussed above, that the government has a strong interest in regulating the violence and coercion that often occurs in the making of pornography. n55 Does it then follow that the government may punish the distribution of materials made in this way as well as the underlying unlawful conduct? The Supreme Court's decision in New York v Ferber n56 suggests an affirmative answer. In Ferber, the Court sustained a statute prohibiting the distribution of any material depicting a sexual performance by a child, primarily on the ground that the law arose from the government's interest in preventing the conduct (sexual exploitation of children) necessarily involved in making the expression. Similarly, it would appear, the government may prohibit directly the dissemination of any materials whose manufacture involved coercion of, or violence against, participants. The Hudnut Court specifically indicated that such a statute would meet constitutional requirements. n57

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n55 See text accompanying notes 41-42.

n56 458 US 747 (1982).

n57 See 771 F2d at 332-33.

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Important questions remain unanswered with respect to this approach, for there are almost surely limits on the principle that the government may engage in viewpoint-neutral regulation of speech whenever it has an interest in deterring conduct involved in producing the expression. The principle itself, in addition to explaining Ferber, may explain such disparate outcomes as the ability of a court to enjoin the publication of stolen trade secrets and to award damages for the unapproved publication of copyrighted material. n58 But some hypothetical applications of the principle suggest the need for a boundary line. For example, could the government prohibit all speech whose manufacture involved violations of the Fair Labor Standards Act? Surely such a statute would violate the Constitution. Or, to use another sort of case, could the government prohibit the distribution of all national security information stolen from government agencies? An affirmative answer would require overruling the Pentagon Papers case. n59 The question arises, [*892] then, how to separate permissible from impermissible applications of the principle. I am not sure that any factor, or even set of factors, can serve to explain fully all the cases mentioned. Some relevant considerations, however, might include the value of the speech at issue, the magnitude of the harm involved in producing the speech, the extent to which prohibiting the speech is necessary to prevent the harm from occurring, and the extent to which the expression itself reinforces or deepens the initial injury. n60 With respect to all of these considerations, the prohibition of materials whose manufacture involves sexual violence seems similar enough to the ban in Ferber to suggest that the regulation, while deterring the worst forms of pornography, still would satisfy First Amendment standards. n61

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n58 See Harper & Row, Publishers, Inc. v Nation Enterprises, 471 US 539 (1985).

n59 See New York Times Co. v United States, 403 US 713 (1971). I thank Geof Stone for suggesting this example.

n60 The Ferber Court viewed the harm involved in manufacturing child pornography as great and the value of the resulting expression as usually, though not always, slight. See 458 US at 757-58, 762-63, 773-74. With respect to the necessity of prohibiting not merely the unlawful conduct, but also the speech itself, the Ferber Court stated that "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." Id at 759. Finally, the Ferber Court noted that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." Id.

n61 The Supreme Court's decision in City of Renton v Playtime Theatres, 475 US 41 (1986), might be taken to suggest--although, I believe, wrongly--a further extension of the argument: that the government may prohibit the distribution of materials even substantially correlated to unlawful conduct in manufacture, so long as the definition of these materials is viewpoint-neutral. In Renton, the Court upheld the regulation of adult motion picture theaters on the ground that such theaters generally correlate with a rise in crime in the surrounding neighborhood. Id at 50. The Court declined to require a showing that any particular movie theater in fact produced these results. Similarly, a statute regulating a category of speech that is highly correlated with coercion of, or

violence against, women might be thought to pass constitutional muster even if a particular instance of that speech did not involve coercion or violence. This line of argument, however, takes what I believe itself to be a problematic decision much too far. Crucial to the Renton holding was the limited scope of the regulation under review: it zoned adult theaters, but did not prohibit them. Id at 53. A total ban on speech, based on a mere correlation between the speech and unlawful conduct (even if the conduct, as in Renton and here, stemmed from something other than the speech's communicative effects), would raise constitutional concerns of much greater magnitude.

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C. Obscenity

The government can also regulate sexually graphic materials harmful to women by using the long-established category of obscenity. This approach to regulating such materials has come to assume the aspect of heresy in the ranks of anti-pornography feminism. Those who have argued for regulating pornography have stressed the differences, in rationale and coverage, between bans [*893] on the pornographic and bans on the obscene. It is said that obscenity law focuses on morality, while pornography regulation focuses on power. n62 It is said that offensiveness and prurience (two of the requirements for finding a work obscene) bear no relation to sexual exploitation. n63 It is said that taking a work "as a whole," as obscenity law requires, and exempting works of "serious value," as obscenity law does, ill-comports with the goal of preventing harm to women. n64 I do not think any of this is flatly wrong, but I do wonder whether these asserted points of difference--today, even if not in the past--suggest either the necessity or the desirability of spurning the obscenity category.

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n62 See MacKinnon, Feminism Unmodified at 147 (cited in note 13).

n63 See id at 174-75; Sunstein, 92 Colum L Rev at 20-21 (cited in note 45).

n64 See MacKinnon, Feminism Unmodified at 174-75 (cited in note 13).

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My doubts began in the midst of first teaching a course on free expression. In keeping with the prevailing view, I rigidly segregated the topics of obscenity and pornography. (If I recall correctly, I taught commercial speech in between the two.) In discussing each, I iterated and reiterated the distinctions between them, in much the terms I have just described. I think I made the points clearly enough, but my students resisted; indeed, they could hardly talk about the one topic separately from the other. In discussing obscenity, they returned repeatedly to the exploitation of women; in discussing pornography, of course, they dwelt on the same. Those who favored regulation of pornography also favored regulation of obscenity--at least as a second-best alternative. Those who disapproved regulation of pornography also disapproved regulation of obscenity. Perhaps it was a dense class or I a bad teacher, but I think not; rather, I think the class understood--or, at the very least, unwittingly revealed--something important.

Even when initially formulated, the current standard for identifying obscenity was justified in part by reference to real-world harms. To be sure, the Supreme Court, in its fullest statement of the rationale for establishing the category of obscenity, spoke of the need "to protect "the social interest in . . . morality' " and, what is perhaps the same thing, of the need " "to maintain a decent society . . . .' " n65 Here, the Court appeared to stress a version of morality divorced from tangible social consequences and related to simple sentiments of offense or disgust. But the Court also spoke [*894] of--indeed, emphasized just as strongly--the "correlation between obscene material and crime" and, in particular, the correlation between obscene materials and "sex crimes." n66 This concern too may reflect a notion of morality, but if so, it is a morality rooted in material harms. n67 And although some of the specific harms then perceived might now appear dated--the Court was thinking as much of unlawful acts involving "deviance" as of unlawful acts involving violence--still the Court understood the obscenity category as emerging not merely from a body of free-floating values, but from a set of tangible harms, perhaps including sexual violence. n68

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n65 Paris Adult Theatre I v Slaton, 413 US 49, 59-60, 61 (1973) (emphasis deleted), quoting Jacobellis v Ohio, 378 US 184, 199 (1964) (Warren dissenting), and Roth v United States, 354 US 476, 485 (1957).

n66 413 US at 58-59.

n67 See Daniel O. Conkle, Harm, Morality, and Feminist Religion: Canada's New--But Not So New--Approach to Obscenity, 10 Const Comm 105, 123-24 (1993), for discussion of these two kinds of morality (offense-based and harm-based) as reflected in obscenity doctrine.

n68 For this reason, I think Catharine MacKinnon's statement that obscenity is "ideational and abstract," rather than "concrete and substantive," represents something of an overstatement, even as applied to the initial understanding and formulation of the category. See MacKinnon, Feminism Unmodified at 175 (cited in note 13).

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Much more important is the way conceptions of obscenity have evolved since then, in part because of the anti-pornography movement itself, in part because of the deeper changes that movement reflects in public attitudes and morals. This shift in understanding, I think, accounted for my classroom experience. It is hard to test a proposition of this sort, but I will hazard it anyway: one of the great (if paradoxical) achievements of the anti-pornography movement has been to alter views on obscenity--to transform obscenity into a category of speech understood as intimately related, in part if not in whole, to harms against women. n69 Surely, such a change in perception should come as no great surprise. It would be the more astonishing by far if obscenity were viewed today as obscenity was viewed two decades ago, when the current constitutional standard was first announced. A doctrinal test does not so easily freeze public understandings, especially when the test in part relies (as the obscenity test does) on community standards and consciousness. n70 Views of obscenity, in other words, are not [*895] static, and they may have evolved in such a way as to link obscenity with harms to women.

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n69 One interesting proof (and product) of this reconceptualization is Senator Mitch McConnell's proposed legislation granting the victim of a sexual offense a right to claim damages from the distributor of any obscene work deemed to have contributed to the crime. Pornography Victims' Compensation Act of 1991, S 1521, 102d Cong, 1st Sess (Jul 22, 1991). Whatever the merits of this legislation, which raises serious concerns on numerous grounds, it clearly presupposes a link between obscenity and sexual violence.

n70 The obscenity standard asks whether the average person, applying contemporary community standards, would find a work prurient and offensive in its depiction of sexual conduct. It also asks whether the work lacks serious literary, artistic, political, or scientific value. See Miller v California, 413 US 15, 24 (1973).

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Now it might be argued, in response to this claim, that so long as the formal test for determining obscenity remains the same, this reconceptualization of obscenity will avail women little, because the test's focus on prurience and offensiveness will prevent new understandings from affecting judicial outcomes. But this response seems to ignore the subtle and gradual ways law often develops. As prosecutors, juries, and judges increasingly adopt this new view of obscenity, enforcement practices and judicial verdicts naturally will come to resemble, although not to replicate, those that would obtain under an anti-pornography statute. There is in fact a substantial overlap between the categories of obscenity and pornography: most of the worst of pornography (materials with explicit and brutal sexual violence) meets the obscenity standard. As public perceptions continue to change, the application of the obscenity standard increasingly will focus on the materials causing greatest harm to women; nor need this development reflect any illegitimate acts of prosecutorial discretion. n71

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n71 If prosecutors determine to enforce obscenity laws only against materials with a certain viewpoint, the resulting actions would be no less problematic than the MacKinnonDworkin statute itself. But this result is hardly the only one that could be produced by changing public norms. For example, as noted earlier and discussed again below, a focus on sexual violence arguably is not viewpoint-biased. See text accompanying notes 52-54 and 74. Thus, to the extent that prosecutors enforce obscenity laws strictly against sexually violent materials that fall within the obscenity category, their acts would not violate the R.A.V. proscription of preferring some viewpoints to others within a low-value category.

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Moreover, this new focus may over time reshape, in a desirable manner, even the governing legal standard for determining obscenity. Doctrinal adjustments and reformulations of existing low-value categories of speech may well--and should--occur more readily than the creation of whole new categories, especially when the proposed new categories incorporate clear viewpoint bias. So, for

example, the current obscenity test's requirement that materials be patently offensive may disintegrate in light of new understandings about the harms the obscenity category principally should address. This evolution of obscenity law recently has occurred in Canada, where the Supreme Court, responding to increased evidence and altered perceptions of harm to women, made sexual violence rather than sexual offensiveness the keystone of the obscenity category. n72 Efforts to redefine the obscenity category in this manner--a redefi [*896] nition that, consistent with much First Amendment theory, would tend to divorce speech restrictions from simple feelings of offense--should proceed in the United States as well. n73

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n72 See Regina v Butler and McCord, 1992 1 SCR 452, 134 NR 81, 108-18 (Canada).

n73 It might be argued that such a redefinition of the obscenity category would render it viewpoint-based and therefore inconsistent with the First Amendment. This argument depends first on the proposition that a statute framed in terms of sexual violence is viewpointbased, which I have discussed in the text accompanying notes 52-54. As important, the argument depends on the proposition that the obscenity category is not now viewpointbased--in other words, that it does not now constitute some kind of exception to the rule of viewpoint neutrality. This proposition is difficult to maintain given the obscenity test's reliance on community standards of offensiveness. See Sunstein, 92 Colum L Rev at 28-29 (cited in note 45). As between an obscenity doctrine that focuses on sexual prurience and offensiveness and an obscenity doctrine that focuses on sexual prurience and violence, the former would appear to pose the greater danger of viewpoint bias.

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One measure along these lines that states or localities might attempt involves the special regulation of subcategories of obscenity that contain sexual violence. R.A.V. might seem to bar such an approach; it held, after all, that even within low-value categories of speech, such as obscenity or fighting words, the government may not make distinctions that pose a danger of viewpoint bias. I have argued above that a statute framed in terms of sexual violence may no more implicate this principle than the several statutes upheld by the Court framed in terms of sexual explicitness. n74 But even if courts reject this argument, another possibility presents itself. The Court in R.A.V. stated as an exception to its broad rule that a subcategory of unprotected speech can be specially regulated if it presents, in especially acute form, the concerns justifying the exclusion of the whole category from First Amendment protection. n75 It is hard to know what this exception means, especially in light of the Court's refusal to apply it to the category of race-based fighting words, which appears to pose in especially acute form the dangers giving rise to the entire fighting words category. It is no less difficult to determine what the exception should mean, given the ability to characterize in many different (and even conflicting) ways the concerns underlying any low-value category and the ease of restating those concerns with respect to any given subcategory. But given the Court's acknowledgment of the relationship between sexual crimes and obscenity, some consideration should be given to whether a statute focusing on the particular kinds of obscenity that most contribute to sexual violence would or should fall within the R.A.V. exception. n76 [*897]

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n74 See text accompanying notes 52-54 and notes 71 and 73.

n75 112 S Ct at 2545-46.

n76 The Court wrote, for example, that "a State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) . . . is in its view greater there." Id at 2546. So too, it might be said, a State may choose to regulate in a special manner sexually violent obscenity because it poses a greater risk of contributing to sexual crimes--one of the characteristics of obscenity that justifies depriving it of full First Amendment protection.

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The key point here is that regulation of obscenity may accomplish some, although not all, of the goals of the anti-pornography movement; and partly because of the long-established nature of the category, such regulation may give rise to fewer concerns of compromising First Amendment principles. Even for those who think that the obscenity doctrine is in some sense a second-best alternative, it represents the first-best hope of achieving certain objectives. And the obscenity doctrine itself may benefit by transformative efforts, as these efforts bring the doctrine into greater accord with the harm-based morality of today, rather than of twenty years ago.

D. Exceptions to Viewpoint Neutrality

The final approach I will discuss, although far more briefly than it deserves, involves crafting arguments to support explicit exceptions to the rule against viewpoint discrimination for pornography or hate speech. As noted earlier, exceptions to this rule do exist, but without any clear rationale; the Court, in upholding viewpoint discriminatory actions, simply has ignored their discriminatory nature. We know, from the decision in R.A.V. and the affirmance of Hudnut, that the Court will follow no such course of studied inattention with respect to pornography or hate speech: in both cases, the presence of viewpoint discrimination was considered--and was declared dispositive. The question, then, arises: Is it possible to make a convincing argument to the contrary? Is it possible, that is, to accept viewpoint neutrality as a general principle, but to support an exception to that principle either for pornography or for hate speech? The challenge here is to explain in credible fashion what makes one or two or three viewpoints (or one or two or three instances of viewpoint discrimination) different from all others--sufficiently different to support an exception and sufficiently different to ensure that the exception retains "exceptional" status. I cannot here provide the answer to that question. Instead, I will confine myself to some general observations about what considerations might be relevant to the inquiry.

Two factors necessary (but, I will argue, generally insufficient) for departing from the norm of viewpoint neutrality are (1) the [*898] seriousness of the harm the speech causes, and (2) the "fit" between the harm and the viewpoint discriminatory mechanism chosen to address it. The first consideration has an obvious basis: to the extent a viewpoint causes

insignificant harm, the state's decision to suppress that viewpoint must rest not on legitimate reasons but on mere dislike of the idea at issue. The second consideration is related and not much more mysterious: when the government restricts a viewpoint, but the viewpoint is not coextensive with the harm allegedly justifying the governmental action, we may wonder (once again) whether the action is in fact motivated by simple distaste for the message. I have no doubt that a regulation of pornography and hate speech would satisfy the first inquiry, and little doubt that such a regulation could be carefully enough constructed to satisfy the second. Is that, however, sufficient?

I think not. Assume, for example, a carefully crafted regulation of abortion advocacy, counseling, or referral (the category of speech involved in Rust v Sullivan n77), designed to reduce the incidence of abortions. Proponents of the regulation might urge that the law is precisely crafted to reduce the significant harms stemming from abortion; hence the law satisfies the two inquiries set forth above. I presume this outcome would strike many as irretrievably wrong. But, some opponents of the regulation might contend, the example fails to prove my larger point because the "harms" in the hypothetical case (however serious some might find them) are in fact widely contested and for that reason cannot form the basis of viewpoint regulation. These opponents might contrast a precisely crafted regulation of pro-smoking speech, designed to reduce the frequency of tobacco use. In that case, the harms are not contested; hence the regulation can go forward. The contrast here has much intuitive appeal, and I am not at all sure it has nothing to teach us. But this general line of reasoning makes the protections of the First Amendment weakest at the very point where views are the most unorthodox and unconventional. And even if I am wrong to think this result upside-down and unacceptable, another question would follow: Are not the harms caused by pornography and hate speech--characterized most generally as racial and sexual subordination--also very much contested? If they were not, the debate over hate speech and pornography might not have reached so intense a level. [*899]

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n77 111 S Ct 1759, 1765 (1991).

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Assuming, then, that harm and "fit" cannot alone justify viewpoint discrimination, perhaps the addition of low-value speech can do so. In other words, if legislators can make the case that speech leads to harm, if the speech regulated correlates precisely with that harm, and if the speech is itself low-value, then any viewpoint discrimination involved in the regulation becomes irrelevant. n78 At first glance, of course, R.A.V. definitively rejected this argument: the very holding of that case was that even within a low-value category of speech, viewpoint discrimination is generally prohibited. So, to use one of the Court's hypotheticals, the government may proscribe libel, but may not proscribe only libel attacking the government; or, to use something near the actual case, the government may prohibit fighting words, but may not prohibit only racist fighting words. n79 But what, then, are we to make of a category like obscenity--an entire low-value category (rather than a subdivision thereof) that seems to incorporate some viewpoint bias? n80 Could it possibly be the case that viewpoint discrimination built into the very definition of a low-value category is permissible, whereas viewpoint discrimination carving up a neutrally defined low-value category is not?

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n78 I take Cass Sunstein to be making something like this argument in these pages. See 60 U Chi L Rev at 829 (cited in note 17).

n79 112 S Ct at 2543 & n 4. The actual ordinance, as construed, prohibited race-based fighting words (discriminating by subject matter), but the Court argued that this restriction operated in practice in the same way as an ordinance banning racist fighting words (discriminating by viewpoint). See id at 2547-48.

n80 See notes 13 and 73.

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The proposition is perhaps less silly than it appears, for the latter, but not the former, lacks the precise "fit" that I above termed necessary for viewpoint regulation. When the Court establishes a low-value category, such as obscenity, it determines that the harms caused by the covered speech so outweigh its (minuscule) value that regulation of the speech, even if viewpoint discriminatory, will be permitted. The Court, in effect, predecides that regulation of the entire category will arise not from governmental hostility to the ideas restricted, but rather from a neutral decision based on harms and value; the viewpoint bias will occur as a mere byproduct of the fact that only the restricted ideas cause great harms and have sparse value. This predetermination insulates the government from a charge of viewpoint bias when the government regulates the entire category. But the establishment of a low-value category has no such effect when the government regulates within the category on the basis of a viewpoint extraneous to the cate [*900] gory's boundaries. In that case, there is reason to suspect that the government is acting not for the reasons already found by the Court to be legitimate, but rather out of hostility to a message. The critical failure in such a regulation relates to "fit": because the regulation is underinclusive--because it does not regulate all speech previously determined to cause great harm and have no value--the concern arises that the government has an illegitimate motive. Hence, to say, as the Court did in R.A.V., that the government may not engage in unrelated viewpoint discrimination within a low-value category--may not, for example, ban only obscenity produced by Democrats--is not to say that viewpoint may not enter into the very definition of a low-value category. Once again, in the latter case viewpoint serves as a placeholder for a balance of harms and values found legitimate by the Court; in the former case, viewpoint serves as a warning signal that the government is acting for other reasons.

But even if this distinction holds, the hard question remains: should the Court accept pornography or hate speech as a low-value category of expression? The currently recognized categories of lowvalue speech seem to share the trait, as Cass Sunstein writes, that they are neither "intended nor received as a contribution to social deliberation about some issue." n81 That definition offers several lessons for any regulation, concededly based on viewpoint, either of hate speech or of pornography. In the case of hate speech, such an ordinance should be limited to racist epithets and other harassment: speech that may not count as "speech" because it does not contribute to deliberation and discussion. In the case of pornography, any ordinance should be limited to materials that operate primarily (as obscene materials operate primarily) as masturbatory

devices; in addition, an explicit exception, like that in the obscenity standard, for works of serious value ought to be incorporated. Only if pornography and hate speech are defined in this narrow manner might (or should) the Court accept them as low-value categories--a classification that, it must be remembered, depends at least as much on the non-expressive quality of the speech as on the degree of harm the speech causes.

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n81 Sunstein, 60 U Chi L Rev at 807.

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In addition to all this, perhaps one other factor--the modesty, or limited nature, of the viewpoint restriction--should be considered prior to recognizing a low-value category of speech incorporating viewpoint bias. This inquiry would focus on whether the regu [*901] lation of the category wholly excises the viewpoint from the realm of public discourse or cuts off only a limited means of expressing the viewpoint. n82 Even the MacKinnon-Dworkin version of anti-pornography legislation would do only the latter: it would prohibit not all messages of sexual subordination, but only those messages expressed in a sexually graphic manner. This feature seems critical to the establishment of any exception to the viewpoint neutrality principle. The broader the restriction, the more it will skew public discourse toward some views and away from others. And the larger the skewing effect, the greater the chances of improper governmental motivation; a wholesale, more than a marginal, restraint suggests a government acting not for neutral reasons, but out of simple hostility to the idea restricted. Of course, the inquiry into the scope of a viewpoint restriction does not lend itself to scientific precision. The matter is always one of degree, involving the drawing of a line someplace on a spectrum. The inquiry, too, is complicated by the issue whether the particular means restricted (even if technically modest) constitute the most effective way of delivering the message, such that the restriction ought to be treated as sweeping. But the haziness of the endeavor does not gainsay the need to engage in it. For a viewpoint restriction that results in excising ideas from public discourse ordinarily ought not to be countenanced--even when the restriction applies only to lowvalue speech and even when the restriction closely responds to serious harms.

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n82 I do not at all advocate here that courts consider the modesty of a viewpoint restriction in all cases involving viewpoint regulation. Rather, I mean that courts should ask this question when the other criteria, discussed above, for departing from the viewpoint neutrality rule have been met. This approach is similar to the one used in City of Renton v Playtime Theatres, Inc., 475 US 41, 53 (1986), in which the Supreme Court looked to the scope of the speech restriction at issue--an inquiry the Court normally eschews--in a case involving low-value speech. For a detailed discussion generally disapproving any inquiry into the modesty of a viewpoint restriction, although not considering the precise issue raised here, see Stone, Content Regulation and the First Amendment at 200-33 (cited in note 26).

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Regulation of Hate Speech and Pornography After R.A.V.

Elena Kagan*

supports R+W as strengthening viewpt neutrality principle

proposes 4 ways to regulate hate speech w/o viol. settled int'l law

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* Assistant Professor of Law, The University of Chicago Law School. This Essay is based on remarks I made in a panel discussion at the conference, "Speech, Equality, and Harm: Feminist Legal Perspectives on Pornography and Hate Propaganda," held at The University of Chicago Law School on March 5-7, 1993. The argument has been expanded only slightly, and the reader is asked to make allowances for my necessarily abbreviated discussion of many complicated issues. I am grateful to Mary Becker, Larry Lessig, Michael McConnell, Geoffrey Stone, David Strauss, and Cass Sunstein for valuable advice and comments. The Class of "64 Fund and the Russell Parsons Faculty Research Fund at The University of Chicago Law School provided financial support.

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TEXT:

This Essay on the regulation of hate speech and pornography addresses both practicalities and principles. I take it as a given that we live in a society marred by racial and gender inequality, that certain forms of speech perpetuate and promote this inequality, and that the uncoerced disappearance of such speech would be cause for great elation. I do not take it as a given that all governmental efforts to regulate such speech thus accord with the Constitution. What is more (and perhaps what is more important), the Supreme Court does not, and will not in the foreseeable future, take this latter proposition as a given either. If confirmation of this point were needed, it came last year in the shape of the Court's opinion in R.A.V. v City of St. Paul. n1 There, the Court struck down a so-called hate speech ordinance, in the process reiterating, in yet strengthened form, the tenet that the First Amendment presumptively prohibits the regulation of speech based upon its content, and especially upon its viewpoint. That decision demands a change in the nature of the debate on pornography and hate speech regulation. It does so for principled reasons--because it raises important and valid questions about which approaches to the regulation of hate speech and pornography properly should succeed in the courts. And it does so for purely pragmatic reasons--because it makes clear that certain approaches almost surely will not succeed.

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n1 112 S Ct 2538 (1992).

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In making this claim, I do not mean to suggest that all efforts to regulate pornography and hate speech be suspended, on the [*874] ground either of mistake or of futility. Quite the opposite. R.A.V. largely forecloses some lines of advocacy and argument (until now the dominant lines), as well perhaps it should have. But the decision leaves open alternative means of regulating some pornography and hate speech, or of alleviating the harms that such speech causes. The primary purpose of this Essay is to offer some of these potential new approaches for consideration and debate. The question I pose is whether there are ways to achieve at least some of the goals of the anti-pornography and anti-hate speech movements without encroaching on valuable and ever more firmly settled First Amendment principles. This Essay is just that--an essay, a series of trial balloons, which may be shot down, from either side or no side at all, by me or by others. The point throughout is to emphasize the range of approaches remaining available after R.A.V. and meriting discussion.

I. THE PROBLEM OF VIEWPOINT DISCRIMINATION

In R.A.V., the Court struck down a local ordinance construed to prohibit those fighting words, but only those fighting words, based on race, color, creed, religion, or gender. n2 Fighting words long have been considered unprotected expression--so valueless and so harmful that government may prohibit them entirely without abridging the First Amendment. n3 Why, then, was the ordinance before the Court constitutionally invalid? The majority reasoned that the ordinance's fatal flaw lay in its incorporation of a kind of content-based distinction. The ordinance, on its very face, distinguished among fighting words on the basis of their subject matter: only fighting words concerning "race, color, creed, religion or gender" were forbidden. n4 More, and much more nefariously in the Court's view, the ordinance in practice discriminated between different viewpoints: it effectively prohibited racist and sexist fighting words, while allowing all others. n5 Antipathy to such viewpoint distinctions, the Court stated, lies at the heart of the guarantee of freedom of expression. "The government may not regulate speech based on hostility--or favoritism--towards the underlying [*875] message expressed"; it may not suppress or handicap "particular ideas." n6

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n2 Id at 2542. The Supreme Court defined "fighting words" in Chaplinsky v New Hampshire, 315 US 568, 572 (1942), as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

n3 Chaplinsky, 315 US at 572.

n4 R.A.V., 112 S Ct at 2541, 2547.

n5 Id at 2547-48.

n6 Id at 2545, 2549.

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The reasoning in R.A.V. closely resembles that found in the key judicial decision on the regulation of pornography. In American Booksellers Ass'n, Inc.

v Hudnut, n7 affirmed summarily by the Supreme Court, the United States Court of Appeals for the Seventh Circuit invalidated the Indianapolis anti-pornography ordinance drafted by Andrea Dworkin and Catharine MacKinnon. That ordinance declared pornography a form of sex discrimination, with pornography defined as "the graphic sexually explicit subordination of women, whether in pictures or in words," that depicted women in specified sexually subservient postures. n8 The core problem for the Seventh Circuit, as for the Supreme Court in R.A.V., was one of viewpoint discrimination. The ordinance, according to the Court of Appeals, made the legality of expression "depend ent on the perspective the author adopts." n9 Sexually explicit speech portraying women as equal was lawful; sexually explicit speech portraying women as subordinate was not. The ordinance, in other words, "establishe d an "approved' view" of women and of sexual relations. n10 From this feature, invalidation necessarily followed: "The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents." n11

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n7 771 F2d 323 (7th Cir 1985), aff'd mem, 475 US 1001 (1986).

n8 Id at 324.

n9 Id at 328.

n10 Id.

n11 Id at 325.

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The approach used in R.A.V. and Hudnut has a large body of case law behind it. The presumption against viewpoint discrimination did not emerge alongside of, or in response to, the effort to curtail certain forms of racist and sexist expression. Rather, that presumption long has occupied a central position in First Amendment doctrine. Decades ago, for example, the Supreme Court employed the presumption to strike down laws restricting expression that discredited the military or that presented adultery in a favorable light, and more recently, the Court invoked the presumption to invalidate flag-burning statutes. n12 This is not to say that the Court invariably has invalidated laws that incorporate view [*876] point favoritism. Exceptions to the rule exist, although the Court rarely has seen fit to acknowledge them as such; in a number of areas of First Amendment law (and especially when so-called lowvalue speech is implicated), the Court breezily has ignored both more and less obvious forms of viewpoint preference. n13 Still, the rule has been more often honored than honored in the breach, and the Supreme Court's opinion in R.A.V., as well as its summary affirmance of Hudnut, could have been expected.

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n12 See Schacht v United States, 398 US 58, 67 (1970) (military); Kingsley Int'l Pictures Corp. v Regents, 360 US 684, 688 (1959) (adultery); Texas v Johnson, 491 US 397, 416-17 (1989) (flag-burning); United States v Eichman, 496 US 310, 317-18 (1990) (same).

n13 Several examples of this blindness to viewpoint discrimination occur in the area of commercial speech. See Posadas de Puerto Rico Associates v Tourism Co. of Puerto Rico, 478 US 328, 330-31 (1986) (upholding a law prohibiting advertising of casino gambling, but leaving untouched all speech discouraging such gambling); Central Hudson Gas & Electric v Public Service Commission, 447 US 557, 569-71 (1980) (striking down a broad law prohibiting advertising to stimulate the use of electricity, but suggesting that a more narrowly-tailored law along the same lines would meet constitutional standards, even if the law were to allow all expression discouraging use of electricity). In addition, as Catharine MacKinnon has noted, the delineation of entire low-value categories of speech, such as obscenity and child pornography, may be thought to reflect a kind of viewpoint discrimination, given that the speech falling within such categories likely expresses a single (disfavored) viewpoint about sexual matters. See Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 212 (Harvard, 1987). Further discussion of this point, and its relevance for the regulation of pornography and hate speech, appears in note 73 and the text accompanying note 80. Finally, the Court has indicated that the usual presumption against viewpoint discrimination does not apply, or at least does not apply in full force, when the government engages in selective funding of speech, rather than selective restriction of speech. See Rust v Sullivan, 111 S Ct 1759, 1772-73 (1991); text accompanying notes 28-29.

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Moreover, the Court's decision in R.A.V. entrenched still further the presumption against viewpoint-based regulation of speech. To be sure, the majority opinion received only five votes and came under vehement attack from the remaining Justices. n14 Thus, some might reason that the disposition of the case reveals a weakening in the Court's commitment to viewpoint neutrality, either across the board or with respect to racist and sexist expression. If this reasoning were valid, those disliking R.A.V. might simply wait and pray for an advantageous change in the Court's membership. But any such reading of the case rests on a grave misunderstanding. The Court's opinion received the support of only a bare majority because, for two reasons having nothing to do with the particular viewpoint involved, the case appeared to some Justices not to invoke the presumption against viewpoint regulation at all. First, [*877] and most important, the alleged viewpoint discrimination in the case occurred within a category of speech--fighting words--that the Court long ago declared constitutionally unprotected. Second, the viewpoint discrimination found in the ordinance existed not on its face, but only in application--and even in application, only with a fair bit of argument. n15 Had the law distinguished on its face between racist (or sexist) speech and other speech outside the category of fighting words, the Court's decision likely would have been unanimous. n16 What R.A.V. shows, then, is the depth, not the tenuousness, of the Court's commitment to a viewpoint neutrality principle. And what R.A.V. did, in applying that principle to a case of non-facial discrimination in an unprotected sphere, was to render that principle even stronger.

RAV strengthened viewpt neutrality principle

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n14 The four Justices who refused to join the Court's opinion also voted to invalidate the St. Paul ordinance, but only because of a concern about overbreadth that easily could have been corrected. They assailed the majority's conclusion that the presumption against viewpoint discrimination mandated invalidation of the statute, either on the view that the presumption failed to

operate in spheres of unprotected speech, see 112 S Ct at 2551-54 (White concurring) and id at 2560 (Blackmun concurring), or on the view that the ordinance incorporated no viewpoint-based distinction, see id at 2570-71 (Stevens concurring).

n15 The St. Paul ordinance, on its face, discriminated only on the basis of subject matter, as the Court conceded. For the dispute on whether the ordinance applied in a viewpointdiscriminatory manner, contrast the majority opinion, 112 S Ct at 2547-48, with the concurring opinion of Justice Stevens, id at 2570-71. Contrast also Cass R. Sunstein, On Analogical Reasoning, 106 Harv L Rev 741, 762-63 & n 78 (1993) (R.A.V. ordinance not viewpointbased in practice), with Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion, 1992 S Ct Rev 29, 69-71 (R.A.V. ordinance viewpoint-based in practice).

n16 See note 14 for a description of the concurring Justices' objections to the Court's decision. In the case hypothesized in the text, those objections would have evaporated.

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Any attempt to regulate pornography or hate speech--or at least any attempt standing a chance of success--must take into account these facts (the "is," regardless whether the "ought") of First Amendment doctrine. A law specifically disfavoring racist or sexist speech (or, to use another construction, a law distinguishing between depictions of group members as equal and depictions of group members as subordinate) runs headlong into the longstanding, and newly revivified, principle of viewpoint neutrality. I do not claim that exceptions to this principle will never be made, or even that such exceptions will not be made by the current Court. Exceptions, as noted previously, have been recognized before (even if not explicitly); they doubtless will be recognized again; and in the last section of this Essay, I consider briefly whether and how to frame them. I do claim that given the current strength of the viewpoint neutrality principle, a purely pragmatic approach to regulating hate speech and pornography would seek to use laws not subject to the viewpoint discrimination objection, while also seeking to justify--as exceptions--carefully crafted and limited departures from the rule against viewpoint regulation. [*878]

This approach, in my view, also best accords with important free speech principles (the "ought" in the "is" of First Amendment doctrine). A focus on the feasible is arguably irresponsible if the feasible falls desperately short of the proper. But here, I think, that is not the case. If reality--the current state of First Amendment doctrine--counsels certain proposals and not others, certain lines of argument and not others, so too do important values embodied in that doctrine. More specifically, the principle of viewpoint neutrality, which now stands as the primary barrier to certain modes of regulating pornography and hate speech, has at its core much good sense and reason. Although here I can do no more than touch on the issue, my view is that efforts to regulate pornography and hate speech not only will fail, but also should fail to the extent that they trivialize or subvert this principle.

Those who have criticized the courts for using the viewpoint neutrality principle against efforts to regulate pornography or hate speech usually have offered one of two arguments. First, some have claimed that such efforts comport with the norm of viewpoint neutrality because they are based on the harm the

speech causes, rather than the viewpoint it espouses. n17 Second, and more dramatically, some have challenged the norm itself as incoherent, worthless, or dangerous. n18 Both lines of argument have enriched discussion of the viewpoint neutrality principle, by challenging the tendency of such discussion to do nothing more than apotheosize. Yet both approaches, in somewhat different ways, slight the reasons and values underlying current First Amendment doctrine--including the decisions in R.A.V. and Hudnut.

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n17 See, for example, Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L J 589, 612; MacKinnon, Feminism Unmodified at 212 (cited in note 13). See also R.A.V., 112 S Ct at 2570 (Stevens concurring). Professor Sunstein always has combined this argument with a fuller analysis of when exceptions to the viewpoint regulation doctrine are justified; for him, the ability to classify a law as harm-based seems not the end, but only the start of the inquiry. See Cass R. Sunstein, Words, Conduct, Caste, 60 U Chi L Rev 795, 796 (1993) (in this issue). My brief discussion, in Section II of this Essay, on whether and when to recognize such exceptions owes much to his work on the subject.

n18 See Mary Becker, Conservative Free Speech and the Uneasy Case for Judicial Review, 64 U Colo L Rev 975, 1044-47 (1993) (arguing that a viewpoint neutrality norm harms women and minority groups); MacKinnon, Feminism Unmodified at 210-13 (cited in note 13) (challenging the ability to identify viewpoint regulation except by reference to social consensus).

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The claim that pornography and hate-speech regulation is harm-based, rather than viewpoint-based, has an initial appeal, but turns out to raise many hard questions. The claim appeals precisely because it reflects an understanding of the value of a view [*879] point neutrality norm and a desire to maintain it: if pornography and hate-speech regulation is harm-based, then we can have both it and a rule against viewpoint discrimination. n19 But the two yearnings may not be so easy to accommodate, for it is not clear that the classification proposed can support much weight. It is true that statutory language can focus either on the viewpoint of speech or on the injury it causes: contrast an ordinance that prohibits "sexually explicit materials approving the subordination of women" with an ordinance that prohibits "sexually explicit materials causing the subordination of women." n20 But if we assume (as a meaningful system of free speech must) that speech has effects--that the expression of a view will often cause people to act on it--then the two phrasings should be considered identical for First Amendment purposes. To grasp this point, consider here a few further examples. Contrast a law that prohibits criticism of the draft with a law that prohibits any speech that might cause persons to resist the draft. n21 Or, to use a case with more contemporary resonance, contrast an ordinance punishing abortion advocacy and counseling with an ordinance punishing any speech that might induce a woman to get an abortion. To sever these pairs of statutes would be to transform the First Amendment into a formal rule of legislative drafting, concerned only with appearance. In all these cases, the facially harm-based statute and the facially viewpoint-based statute function in the same way, because it is speech of a certain viewpoint, and only of that viewpoint, which causes the alleged injury. The facially harm-based statute in these circumstances will curtail expression of a

particular message as surely as will the statute that refers to the message in explicit language. Given this functional identity, the statutes properly are viewed as cognates. n22 [*880]

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n19 I suspect that a wish of this kind explains Justice Stevens's insistence in R.A.V. that the St. Paul ordinance regulated speech "not on the basis of . . . the viewpoint expressed, but rather on the basis of the harm the speech causes." 112 S Ct at 2570 (Stevens concurring). Both in R.A.V. and in numerous other opinions and articles, Justice Stevens has expressed unwavering support for the presumption against viewpoint regulation. For the most recent example, see The Hon. John Paul Stevens, The Freedom of Speech, 102 Yale L J 1293, 1309 (1993).

n20 The example, in slightly different form, appears in Geoffrey R. Stone, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv J L & Pub Pol 461, 467 (1986). As Stone points out, the MacKinnon-Dworkin ordinance, as written, is at any rate closer to the law focusing on the viewpoint espoused than to the law focusing on the harm caused. Id.

n21 This example also appears in Stone. Id.

n22 An argument to the contrary might rely not on the effects of the statutes, but on the intent of the legislature in passing them. The claim here would be that the facially harmbased statute more likely springs from a legitimate governmental motive than does the facially viewpoint-based statute. But this claim seems dubious in any case in which the statutes in fact operate in a similar manner. Because the legislators will know that the facially harm-based statute, like the facially viewpoint-based statute, will succeed in curtailing a specific message, their decision to phrase the statute in terms of harm (especially in light of a legal rule that effectively counsels them to do so) cannot provide a guarantee of legitimate intent.

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This equivalence does not by itself destroy the claim that pornography regulation is harm-based, because both versions of the law might be characterized in this manner: so long as a legislature reasonably decides, as it surely could with respect to pornography, that speech causes harm, then regulation responding to that harm (however framed) might be considered neutral, rather than an effort to disfavor certain viewpoints. But this approach, too, makes any distinction between viewpoint-based regulation and harmbased regulation collapse upon itself. Using this analysis, almost all viewpoint-based regulation can be described as harm-based, responding neutrally not to ideas as such, but to their practical consequences. For it is difficult to see why anyone would opt to regulate a viewpoint that did not cause what seemed (to the regulators at least) to be a harm--or at a bare minimum, that could not reasonably be described as harmful. So, to return to the examples used above, a law prohibiting criticism of the draft could be termed harm-based given that such speech in fact produces draft resistance; or a law prohibiting abortion counseling and advocacy could be termed harm-based given that such speech in fact increases the incidence of abortion (which many would count a serious injury). The substitution of labels--"harm-based" for "viewpoint-based"--thus either allows most viewpoint regulation to go forward or leaves yet unanswered

the central issue of precisely when such regulation is appropriate.

The more extreme critique of a case like Hudnut--that viewpoint discrimination doctrine is both incoherent and corrupt--is in many ways more difficult to counter. This critique rebels against the very core of First Amendment doctrine by accepting the government's power to suppress viewpoints as such whenever the viewpoints are thought to cause some requisite harm. n23 But the justification for this position includes at least one extremely potent point: that recognizing viewpoint regulation may well depend on the decisionmaker's viewpoint; more specifically, that a judicial [*881] decisionmaker will be least likely to recognize (or count as relevant) viewpoint regulation when the regulator's viewpoint lines up with his own. n24 This phenomenon may explain in part the willingness of courts to accept anti-obscenity laws at the same time as they strike down anti-pornography laws. n25 More generally, this epistemological problem may skew viewpoint discrimination doctrine, as it operates in practice, in favor of the status quo--resulting in the disproportionate approval of laws most reflective of traditional sentiment and the disproportionate invalidation of laws least so.

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n23 See MacKinnon, Feminism Unmodified at 212-13 (cited in note 13). Even under current First Amendment doctrine, the government may engage in viewpoint discrimination in emergency circumstances amounting to something like a clear and present danger. The critique discussed in the text would allow viewpoint regulation on a much less stringent showing.

n24 See id at 212; Becker, 64 U Colo L Rev at 1046-47 (cited in note 18).

n25 For discussion of the viewpoint bias inherent in obscenity laws, see notes 13 and 73 and text accompanying note 80.

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But even assuming this is true, I doubt that the appropriate response lies in undermining, let alone eliminating, the viewpoint discrimination principle. That principle grows out of two concerns, as meaningful today as ever in the past. n26 The first relates to the effects of viewpoint discrimination: such action skews public debate on an issue by restricting the ability of one side (and one side only) to communicate a message. The second relates to governmental purposes: viewpoint regulation often arises from hostility toward ideas as such, and this disapproval constitutes an illegitimate justification for governmental action. Of course, particular instances of viewpoint discrimination may spring from benign purposes and have benign effects. Legislators may engage in viewpoint discrimination in an effort not to suppress ideas, but to respond to real harms; and the resulting damage to public discourse may signify little when measured against the harms averted. But how are the courts, or the people, or even legislators themselves to make these determinations of motive and effect in any given case? Will it not always be true that a benign motive can be assigned to governmental action? Will not any judgment as to relative harms depend on an evaluation of the message affected? From these questions, relating to the difficulty of evaluating particular purposes and effects, emerges a kind of rule-utilitarian justification for the ban on viewpoint discrimination.

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n26 The classic discussion of the bases for viewpoint discrimination doctrine is Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm & Mary L Rev 189 (1983).

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The historic examples of the dangers of viewpoint discrimination, on the counts of both purpose and effect, are well-known and legion: the government's attempts, especially during World War I, to stifle criticism of military activities; its attempts in the 1950s to [*882] suppress support of Communism; its efforts, stretching over decades, to prevent the burning of American flags as a means of protesting the government and its policies. n27 And if all these seem remote either from current threats or from the kind of viewpoint regulation at issue in Hudnut and R.A.V.--if they seem the stories of another generation, with little relevance for today--consider instead the case of Rust v Sullivan, n28 previewed in earlier hypotheticals. There, the government favored anti-abortion speech over abortion advocacy, counseling, and referral, and the Court, to its discredit, announced that because the selectivity occurred in the context of a governmental funding program, the presumption against viewpoint discrimination was suspended. n29 Or instead consider the numerous ways in which some of the strange bedfellows of anti-pornography feminists (and one must admit their presence) might choose (indeed, have chosen) to attack the expression of, among others, gays and lesbians.

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n27 See Akhil Reed Amar, The Supreme Court, 1991 Term--Comment: The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 Harv L Rev 124 (1992), for a comparison of R.A.V. and the Court's most recent flag-burning cases, Texas v Johnson, 491 US 397 (1989), and United States v Eichman, 496 US 310 (1990).

n28 111 S Ct 1759 (1991).

n29 Id at 1771-73. For a comparison of Rust and R.A.V., see Kagan, 1992 S Ct Rev 29 (cited in note 15).

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The key point here is only strengthened by the insight that viewpoint discrimination doctrine, as applied by the courts, has a way of producing some patterned inconsistencies; or to put this another way, the very critique of the Court's viewpoint discrimination doctrine exposes the need for a viewpoint neutrality principle. For what the critique highlights is the tendency of governmental actors (of all kinds) to see speech regulation through the lens of their own orthodoxies, as well as the ease with which such orthodoxies can thereby become entrenched. Recognition of this process lies at the very core of the viewpoint discrimination doctrine: as Justice Stevens recently has noted, that doctrine responds, preeminently, to fear of the "imposition of an official orthodoxy," n30 even (or perhaps especially) as to matters involving sex or race. That judicial decisionmakers, in applying the doctrine, sometimes will succumb to the views they hold hardly argues in favor of granting carte blanche to legislative decisionmakers to bow to theirs. It is difficult to see how

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SYMPOSIUM: DEVELOPMENTS IN FREE SPEECH DOCTRINE: CHARTING THE NEXUS BETWEEN SPEECH AND RELIGION, ABORTION, AND EQUALITY: ARTICLE: When A Speech Code Is A Speech Code: The Stanford Policy and the Theory of Incidental Restraints

Elena Kagan*

Stanford anti-harassment policy is a direct not an incidental restraint on speech. legally + politically both otherwise

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TEXT:

[*957] The title of Professor Grey's article, How to Write a Speech Code Without Really Trying, is instructive, if in some tension with what follows it. The title suggests two points: first, that Grey did not intend to write a speech code; second, that Grey wrote a speech code. I'll trust Grey on the first; he would know better than I. I'll agree with him on the second -- except that I'm agreeing with his title only; as the rest of his article makes clear, Grey still denies he wrote a speech code. It is on that essential point, involving the distinction in First Amendment doctrine between direct and incidental restraints, that I take issue with his exceptionally interesting and provocative article.

Grey wrote an exceedingly narrow speech code -- perhaps the narrowest that can be imagined. He wrote a speech code, as he insists, that in some sense recognized the value of a free speech system. He wrote a speech code that a reasonable system of First Amendment law could permit. n1 But Grey did write a [*958] speech code, and from that fact a great deal both does and should follow.

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n1 This is not to say that the current system of First Amendment law permits the Stanford Policy. That Policy, as Grey explains, barred a subset of unprotected speech -- specifically, fighting words, based on sex, race, or other listed characteristics. As restrictions on speech go, this one is narrow indeed; too, it is prefaced, for whatever this is worth, with a statement of commitment to the principles of free inquiry and speech. But unless Grey is right that the Stanford Policy should be viewed not as a ban on speech, but as part of a

generally applicable regulation against discrimination, the Policy falls within the holding of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), that a prohibition of race-based fighting words violates the First Amendment. I have discussed that decision in an earlier article. See Elena Kagan, The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion, 1993 S. CT. REV. 29, 60-76. As I noted there, I agree with Grey and all the concurring Justices in R.A.V. that even under its own analysis, the R.A.V. Court might well have upheld the St. Paul ordinance -- and thus also approved the Stanford Policy -- as a ban on the subcategory of fighting words that most pose the dangers associated with fighting words generally.

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This Comment on Grey's article addresses the scope of the First Amendment's doctrine of incidental restraints, which I think Grey misdescribes. It considers both the rationale and the need for that doctrine, which I think Grey underacknowledges. And finally it notes some practical political effects of the doctrine, which I wish Grey, in his capacity as drafter of the Stanford Policy, had more fully recognized. What is perhaps most disturbing about the Stanford experience is not that the University adopted, yes, a speech code, but that in doing so, it did little to foster, and perhaps much to undermine, its own (and Grey's own) goal of equality.

I. APPLYING THE DOCTRINE OF INCIDENTAL RESTRAINTS

Grey defends the Stanford Policy primarily on the basis of the distinction prevalent in First Amendment law between direct and incidental restraints on expression. n2 The Policy, according to Grey, did not concern speech as such; it concerned all discriminatory harassment, of which "hate speech," narrowly defined, formed just a part. n3 Because the Policy was generally applicable [*959] in this manner, applying to both speech and conduct, it raised no serious First Amendment problem. Of course, the Policy specifically described its application to expression, explaining that fighting words based on sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin fell within its broader coverage. But this explicit notation, according to Grey, should have counted for, rather than against, the Policy because by making clear precisely what speech the general prohibition covered, the reference mitigated the potential chilling effect of the Policy on other expression. n4

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n2 Grey's need to defend the constitutionality of the Policy arises from the Leonard Law, which applies First Amendment requirements to the disciplinary regulations of California's private universities. See CAL. EDUC. CODE @ 94367 (West Supp. 1996). Even before passage of the Leonard Law, however, both Stanford and Grey had committed themselves to abiding by First Amendment standards. Whether a university like Stanford should commit itself in this manner seems to me a difficult question, which this Comment will not address.

n3 See Thomas C. Grey, How to Write A Speech Code Without Really Trying: Reflections on the Stanford Experience, 29 U.C. DAVIS L. REV. 891, 928-35 (1996). Grey assumes in his article, as I do in this reply, that an inarguably general law against discriminatory harassment -- a law that did not mention

speech at all -- would meet any applicable First Amendment requirements, even when applied to such speech as the Stanford Policy covered. The Supreme Court has indicated its agreement. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993). Some commentators, however, have disputed the point. See, e.g., Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment, 52 OHIO ST. L.J. 481 (1991) (stating that broad judicial definition of harassment in Title VII, including speech, is inconsistent with First Amendment); Eugene Volokh, Freedom of Speech and Workplace Harassment, 39 UCLA L. REV. 1791 (1992) (arguing that general anti-harassment laws do not satisfy First Amendment requirements).

n4 See Grey, supra note 3, at 923-24.

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To evaluate this claim, it is necessary to take a step backward and ask what underlies the Court's distinction between direct and incidental restraints on expression. n5 The distinction makes no sense if what matters, under First Amendment doctrine, is the effects of a law on a speaker's expressive opportunities. The Stanford student who wishes to engage in race-based invective will "suffer" no more from a direct restriction on hate speech than from a generally applicable anti-discrimination regulation that covers all the speech affected by the direct restriction, but conduct in addition. The distinction likewise makes no sense if what matters is the effects of a law on an audience's ability to hear and consider a range of viewpoints. Again, the debate about race in the Stanford community will "suffer" no more from the one (speech-directed) form of regulation than from the other (generally applicable) kind. So much is always true of the distinction between direct and incidental restraints: the Court's use of the distinction cannot derive from considering the effects of such restraints, whether on a speaker or on an audience. n6

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n5 For more expansive treatment of this subject, see Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Analysis, 63 U. CHI. L. REV. 413, 491-505 (1996); Frederick Schauer, Cuban Cigars, Cuban Books, and the Problem of Incidental Restraints on Communications, 26 WM. & MARY L. REV. 779 (1985); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 105-14 (1987).

n6 To use a far-flung example, compare a (direct) law imposing a penny tax on the Sunday edition of the New York Times with a (generally applicable) law providing tax benefits for companies entering into certain kinds of mergers. Even if the effect of the direct law is nil and the effect of the generally applicable law is to restructure the whole communications industry, current doctrine subjects the former to strict scrutiny and the latter to mere rationality review.

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[*960] But now assume that First Amendment law largely concerns motives, rather than effects -- more specifically, that the doctrine has as its primary, though unstated, object the discovery of improper governmental motive. n7 This prohibited motive may roughly be termed "ideological"; it exists when simple disapproval of an idea -- as distinct from a neutral evaluation of the harm

that idea causes -- enters into the decision to limit expression. n8 The Court, of course, cannot ascertain this illicit motive directly -- or at least, cannot do so with any effectiveness. Hence, the Court (whether consciously or not is unimportant) has constructed and relied upon a set of rules and categories, most focusing on the facial aspects of a law, that operates as a proxy for this direct inquiry. These rules comprise tools to flush out impermissible motive and invalidate actions infected with it: they enforce the central command of the First Amendment that the government cannot interfere in the realm of speech simply because it finds some ideas correct and others abhorrent.

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n7 For a broadscale defense of this proposition, discussing many aspects of First Amendment law, see Kagan, supra note 5.

n8 This definition of impermissible motive raises many hard questions, of both a conceptual and a practical nature. For discussion of these issues, which I cannot explore here, see generally id. at 428-37.

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The doctrine of incidental restraints, as Grey himself recognizes, n9 serves precisely this function of assisting in the discovery of improper motive. A generally applicable law by definition targets not a particular idea, nor even ideas broadly speaking, but an object that need not, and usually does not, have any association with ideas whatsoever. The breadth of these laws makes them poor vehicles for censorial designs; they are instruments too blunt for either effecting or reflecting ideological disapproval of certain messages. (Consider, for example, the likelihood that a law prohibiting fires in public places -- though encompassing such speech as the burning of an American flag -- has resulted from ideological disapproval of certain messages.) Thus, incidental restrictions receive minimal constitutional scrutiny because of the likelihood that they will also be accidental restrictions in the relevant sense -- that they will result from a process in which officials' hostility toward ideas qua ideas played no role.

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n9 See Grey, supra note 3, at 919.

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[*961] With this as background, turn to the Appendix of Grey's article and review the text of the Stanford Policy. n10 The Policy is not a regulation that, in the manner of incidental restraints generally, refers to a broad class of activity, including but nowhere mentioning expression. The Policy is not even a regulation that breaks down a broad class of activity into all its component parts, listing expression but equivalently listing kinds of non-expressive conduct as falling within the scope of the general prohibition. The Policy, although referring to a broad anti-discrimination ideal, is nonetheless -- on its face and by its terms -- all about expression. It explicitly considers the benefits and harms of expression; weighs the one against the other; determines the point at which ideals of free inquiry should give way to opposing values. The Policy, in other words, constitutes the very opposite of the usual incidental restraint: a specific and considered judgment of the desirability

of restricting certain expression.

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n10 See id. at Appendix.

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As a law takes on this form, the Court's motive-based concerns rise to the fore. Consider, to continue the example previously offered, if a city were to replace its general ban on public fires with an ordinance explicitly discussing application of the ban to flag-burning. No one deciding whether to adopt the new, focused ordinance could do so without evaluating its effect on speech -- more, without evaluating its effect on a particular message. And in considering this effect, sheer hostility of the idea -- that is, impermissible motive -- well might enter the decision-making process. So too when Stanford adopted its new Policy, moving from a generalized "morals code" to an explicit exposition of how this code applied to certain racist (sexist, etc.) expression. In general, as a limit on speech becomes less hidden, the danger of illicit motive increases: hence the current doctrine's distinction between facially direct and facially incidental restrictions. n11 For a court to do what Grey suggests -- to classify an explicit speech-directed action as "incidental" whenever [*962] it can be conceptualized as a component of a broader, non-speech prohibition -- would subvert the very basis of the doctrine. Such a move would prevent the doctrine of incidental restraints from performing its core function of ferreting out impermissible governmental motive.

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n11 Of course, this generalization, like all generalizations, sometimes fails; it even could be argued that it does not hold up in the Stanford case because the initial incidental ban obviously and importantly (even if not facially) applied to speech. But the generalization works well enough to make it a useful test for ascertaining governmental motive, given the difficulty of finding such motive directly.

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Grey is right that the rule against directly referring to speech, if followed in this case, would have made the Policy's application to speech more vague and hence more chilling. But it is not surprising that First Amendment doctrine declines to take account of this point. First, the enhanced chilling effect that Grey notes is not usually, let alone invariably, the result of a narrow (i.e., the current) understanding of the category of incidental restraints. Such an effect arises here only because the contours of the general prohibition are unusually uncertain; in the more common case, a list of applications to speech will serve as much to confuse as to clarify the issue. n12 Second and more important, First Amendment doctrine, as I have suggested earlier, always cares less about effects than about motives. n13 In any clash between the two -- in any case in which a concern with untoward effects points to one doctrinal rule and a concern with improper motive points to another -- the doctrine tracks the concern with motive. The distinction between direct and incidental restraints, in both its broad outlines and its shadings, provides but a single instance. n14 Grey's attempt to rework the distinction -- to divorce it from its underlying motive-based rationale, which in turn links it with the rest of First

Amendment doctrine -- thus was preordained for failure.

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n12 Consider, for example, the law against lighting fires in public places (incidentally restricting a person who burns a flag as a means of protest), or a law against vandalism (incidentally restricting a person who draws a swastika on a synagogue wall), or a law against trespass (incidentally restricting a person who burns a cross on private property). In cases of this kind -- which are very much the norm -- listing the law's potential applications to expression cannot serve a constitutionally legitimate purpose.

n13 See supra note 8 and accompanying text.

n14 See Kagan, supra note 5, at 491-505.

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II. CHALLENGING THE DOCTRINE OF INCIDENTAL RESTRAINTS

Perhaps recognizing the difficulty of labeling the Stanford policy an incidental rather than a direct restraint, Grey turns [*963] midway through his article to challenging the coherence of that distinction, at least when civil rights law is at issue. n15 The basic point is by now familiar, having become a staple of certain critical race theory. n16 We cannot distinguish, or so the argument goes, between civil rights statutes (incidental restraints) and hate speech codes (direct restraints), because both really target expression. In Grey's words, "we prohibit discrimination in significant part because of its 'expressive content,' because of the message of group inferiority it sends." n17 The proscription, for example, of segregated schools should be viewed at least in part as a ban on the message of racial inferiority, deemed to cause stigmatic injury. The proscription contained in a hate speech code is nothing more. Hence, to put the point in its bluntest form, the Supreme Court's decision in Brown v. Board of Education n18 conflicts with the district court's decision invalidating the Stanford Policy.

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n15 See Grey, supra note 3, at 934.

n16 See, e.g., Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 449-57.

n17 Grey, supra note 3, at 934.

n18 347 U.S. 483 (1954).

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In staking this claim, Grey no doubt is on to something. Antidiscrimination laws are in part about message. Indeed, we can abstract Grey's point, because so too are other kinds of laws apparently directed at conduct. Many incidental restraints interfere, as civil rights laws do, with the communication of a message attending an act, as well as the injury that follows from that communication. This is because both conduct and speech may cause identical

"expressive" harms, such as stigmatization. The phenomenon is not limited to the sphere of civil rights, but exists all over, by virtue of the simple fact that most acts say, as well as do, something. n19

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n19 Conversely, most speech does as well as says something in some sense. For the most extreme version of this claim and its implications, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 129-30, 193-94 (1987). For a more moderate version, in part critiquing MacKinnon, see Cass R. Sunstein, Words, Conduct, Caste, 60 U. CHI. L. REV. 795, 836-40 (1993).

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But it is well not to overstate the equivalence of an act and the message it carries, whether in the field of civil rights or in any other. Grey provides, though perhaps does not highlight [*964] sufficiently, the appropriate caveat: after all, he notes, discrimination (in employment, housing, or other material benefit) remains discrimination even when well hidden. n20 Message matters, but it is not all that matters; when the government forbids, say, segregated schools, it does more than shape the world of communication. This wider significance is precisely what justifies the generalization, discussed earlier, that an incidental restriction is less likely than a direct restriction to arise from hostility toward certain messages: because the government is regulating on the basis of something other, or at least more, than expressive content, this illicit factor should have less effect on the decision-making process.

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n20 See Grey, supra note 3, at 934-36.

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Perhaps more important, I count Grey's claim as a prime example of a category of academic ideas that I call Ultimately Useless Insights -- ideas that, however true and even important in some sense, do not and cannot assist in the elaboration of legal doctrine. Grey himself half-concedes this point by noting the logical conclusion of his insight: If civil rights laws partly target the "stigmatic messages" associated with conduct and if, therefore, the same messages, when conveyed by speech, are likewise subject to limit, "there wouldn't," in Grey's own words, "be much to freedom of speech on some of the central contested issues in our politics and culture." n21 Under the proposed analysis, the government (or a university operating under the government's rules) could restrict not only race-based (or sexbased, etc.) fighting words, but all speech that stigmatizes on the basis of group characteristics. The care that Grey put into crafting a carefully limited restriction, applying only to fighting words, would have been wasted. The expressive content of the conduct that civil rights laws target would render vast amounts of speech on race (or gender, etc.) proscribable.

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n21 Id. at 937. The alternative conclusion of Grey's insight is that there wouldn't be much to civil rights laws. This conclusion would hold if the

message associated with discriminatory conduct brought laws prohibiting that conduct under the protection of the First Amendment.

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The same point applies generally. If the conduct encompassed by an incidental restriction has some expressive content, as almost all conduct does, Grey's insight would seem to allow direct [*965] restriction of any speech with the same message. Alternatively, though Grey does not consider the possibility, his insight might require the protection of any conduct expressing a message -- that is, of conduct generally. Either way, First Amendment analysis becomes impossible: either the First Amendment protects no speech, or it protects speech and all else in addition. Some distinction between direct and incidental restraints, regardless whether the precise motive-related distinction used in current law, thus seems a necessary component of a free speech system.

Grey may agree with this much; perhaps in questioning the conceptual foundations of the distinction, he wishes not so much to overturn it as to render it irrelevant to certain (but only certain) civil rights-type cases. But if that is the point of his critical insight, he must show how what he calls the "hearts and minds" argument can fit within, rather than subvert, a workable, judicially administrable doctrine of incidental restrictions. Until then, Brown will not justify the Stanford Policy.

III. POLITICS, THE POLICY, AND THE DOCTRINE OF INCIDENTAL RESTRAINTS

Stanford, of course, had a policy before (and after) the Policy -- a policy that the Policy was supposed to enhance. Termed the Fundamental Standard, it requires "respect for order, morality, personal honor and the rights of others." n22 Interpreted on a case-by-case basis over the years, the Standard is understood to prohibit, in the words of the President of the University, all "harassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry." n23 This regulation, unlike Grey's Policy, is an incidental restraint. n24

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n22 Id. at 893 n.6 (quoting Stanford's Fundamental Standard).

n23 Id. at 897 n.20 (quoting Stanford President Gerhard Casper).

n24 To say that the Standard is an incidental restraint is not to say that the First Amendment is irrelevant. An incidental restraint, when applied to speech, may trigger heightened scrutiny (usually of an intermediate level), as the seminal case of United States v. O'Brien, 391 U.S. 367, 376-77 (1968), shows. Applications of the Standard to expression thus may have to meet certain First Amendment requirements. But I agree with Grey -- and with the dictum in R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) -- that this would not be the case where the speech affected falls within a category of wholly proscribable speech, as do threats or fighting words. And even when speech is fully protected, as in O'Brien, the application of an incidental restriction to the speech usually (though not always) will receive more deferential treatment than a direct restraint on the same expression.

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[*966] Like many incidental restraints, the Standard has a potentially profound effect on expression. The Standard, as interpreted, already may have prohibited all of the speech specifically barred by the Policy. No doubt the Standard prohibited more speech besides. Judged solely by its efficacy in eradicating a certain kind of harmful speech, the direct restriction held no advantage over the incidental restraint.

Proponents of the Policy might claim for it a symbolic function. True, the Standard might succeed in punishing bigoted speech of a harassing nature. What the Standard cannot do -- precisely because it is an incidental restriction -- is to send a clear message about the University's attitude toward this expression. Grey has argued in support of his Policy on another occasion that it was necessary to convey the University's attitude toward bigotry and intolerance. n25 Similarly, Richard Delgado has urged on behalf of his proposed tort action for racial insults, which Grey approves, that it "communicat[es] to the perpetrator and to society that such abuse will not be tolerated." n26 The general proscription can accomplish all the garden-variety ends of regulation; the particular, speech-directed proscription is needed, or so the argument runs, to communicate as forcefully as possible the governmental actor's commitment to the goal of equality.

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n25 See Thomas C. Grey, Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment, 8 SOC. PHIL. & POL'Y 81, 104 (Spring 1991) (writing that "I concede that the main purposes behind the proposal are in a certain sense educative or symbolic.").

n26 Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling, 17 HARV. C.R.-C.L. L. REV. 133, 147 (1982).

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This understanding of the Policy, which views an orientation toward speech as critical to the achievement of the regulatory goal, itself casts doubt on Grey's claim to have drafted an incidental restriction. Indeed, this view of the Policy, by highlighting the different motives that may lie behind direct and incidental restrictions, suggests one of the key reasons for distinguishing between these kinds of regulation. But I want to end this commentary by placing these doctrinal issues to one side and evaluating Grey's handiwork solely in terms of its own primary objective: the advancement of equality in the University and the broader community. This evaluation suggests some practical [*967] political drawbacks of moving, as Grey and Stanford decided to do, from the generally applicable to the speech directed.

Grey himself alludes to such concerns, in the conclusion to his article, when he discusses the way in which adoption of the Stanford Policy distracted from debate, and potential progress, on more important issues of race and gender. n27 Grey notes that a broader argument about affirmative action on the Stanford campus was diverted into the controversy over fighting words. And citing Henry Louis Gates's potent arguments, Grey more generally concedes the ability of disputes on speech to shift attention from, even excuse inattention to, weightier issues, extending far beyond the academic setting, of inequality in

housing, employment, and other material goods. n28 But even while acknowledging these costs, Grey stubbornly hangs on to the Stanford Policy, just as other academics in other educational institutions insist on still broader restrictions on expression. Hence occurs the direction of energy away from the alleviation of material inequalities and toward the elimination -- yes, of "only words" n29 -- of "insults, epithets, and name calling." n30

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n27 Grey, supra note 3, at 939-45.

n28 See id. at 928. Gates terms the critical race theorists' focus on hate speech "a see-no-evil, hear-no-evil approach toward racial inequality," noting that "even if hate [speech] did disappear, aggregative patterns of segregation and segmentation in housing and employment would not disappear." Henry L. Gates, Jr., Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights, THE NEW REPUBLIC, Sept. 20, 1993, at 49.

n29 CATHARINE A. MACKINNON, ONLY WORDS (1987).

n30 See generally Delgado, supra note 26.

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The costs of opening this two-front war are higher even than in the usual case -- greater than the inevitable loss of focus and dispersion of resources. As an initial matter, the second front here occurs in the one place where the opposition -- however disingenuous and hypocritical in fact -- seems to many to hold the high ground. n31 It is poor strategy to turn a battle about discrimination into a battle about speech -- to mount the kind of attack most likely to transform the forces of hatred into the [*968] defenders of constitutional liberty. Relatedly, the second front here causes not merely the division, but the permanent loss of resources. As speech codes, in Grey's words, "set civil rights advocates and civil libertarians . . . against each other," they threaten to rend the coalitions that have served well on other, more important issues. n32 Grey's tactic of limiting and hedging such a code can contain, but not avert, this damage.

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n31 Even Charles Lawrence, a defender of at least some speech codes, has noted:

I fear that by framing the debate as we have -- as one in which the liberty of free speech is in conflict with the elimination of racism -- we have advanced the cause of racial oppression and . . . placed the bigot on the moral high ground, fanning the rising flames of racism.

Lawrence, supra note 16, at 436.

n32 Grey, supra note 3, at 944-45.

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I suspect that the temptation to fight on this ground, seemingly irrespective of tactical advantage, derives from frustration, even desperation, over the slow pace of progress in eradicating the tangible, socio-economic inequalities existing between blacks and whites and, to a lesser extent, between men and women. The magnitude and duration of these inequalities may make them appear impervious to political (let alone to academic) efforts. We do not know how to solve these problems; we may not even know how (or perhaps we are afraid) to talk about them. So some succumb to the allure of sideshows, such as the one involving the Stanford Policy. There, the issues seem contained, the solutions discernible, the link between activism and result still full of potential. Victory is achievable, if ultimately empty. n33

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n33 See Gates, supra note 28, at 49 (stating that "[t]he advocates of speech restrictions will grow disenchanted not with their failures, but with their victories, and the movement will come to seem yet another curious byway in the long history of our racial desperation").

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The lesson the Stanford experience suggests to me is one about resisting such urges. If, as Grey laments, "the effort ended up with a grotesquely unreal portrayal of Stanford as a campus under the dominion of the thought police" n34 -- if in doing so, the effort only undermined serious attempts to advance the goal of equality -- neither Grey nor Stanford should profess much surprise. Stanford's course of action -- its shift from a generally applicable ban on harassment, including racial or sexual harassment, whether or not accompanied by expression, to a targeted ban on certain bigoted harassing speech -- misjudged the political, as well as the legal, environment. Just as the Policy, in directly rather than incidentally restricting speech, became vulnerable to judicial invalidation, so too did it become a focal point [*969] for all manner of public complaint over Stanford's race and gender policies. The law and the politics of moving from the general to the particular thus coincided. From either perspective, Stanford and Professor Grey should have declined to convert an incidental into a direct restraint.

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n34 Grey, supra note 3, at 939-40.

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